

In re Marriage of Kushesh

We have learned from classic literature and from good writers and journalists that the first sentence of a work is crucially important ["It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity..."]. The first sentence of the *Kushesh* opinion reads as follows: "No published opinion to date has addressed whether an Interspousal Transfer Grant Deed (ITGD) meets the requirements for a transmutation of the character of marital property under Family Code section 852." That should get our attention. This opinion holds that an Interspousal Transfer Grant Deed contains sufficient language to constitute a valid and enforceable transmutation from community property to one spouse's separate property.

We have been conditioned that a valid transmutation should contain language of express declaration of an intent to transmute, emanating from the Supreme Court's opinion in *Estate of MacDonald* (1990) 50 Cal.3d 262. As the *Kushesh* tribunal observes: "Most of the litigation involving section 852 has centered on the 'express declaration' element." The *MacDonald* Court held that opening of IRA accounts *did not qualify* as a transmutation of community property to separate property, even though the wife had signed a writing to the effect that she had consented. Complicating the transmutation analysis was *Estate of Bibb* (2001) 87 Cal.App.4th 461, where the Court held that a Grant Deed signed by the deceased husband transferring his separate property interest in an apartment to himself and his wife as joint tenants *was effective* to transmute his separate property interest to community property. *Kushesh* held that the present case is more like *Bibb* (transmutation enforceable) than *MacDonald* (transmutation not valid).

The *Kushesh* opinion also addressed transmutation nuances in *In re Marriage of Valli* (2014) 58 Cal.4th 1396. The *Valli* majority held that the Family Code transmutation statute took precedence over the Evidence Code title presumption, but did not go so far as to say that the Evidence Code presumption might never apply in some other family law context. *Kushesh* opined that the trial court erred by improperly extending what *Valli* said about the title presumption with the elements of transmutation in section 852. Interspousal Transfer Grant Deeds are not only title documents, they are also writings that expressly transfer spousal interests, in which spouses unequivocally make interspousal transfers to one another. They don't just *reflect* title, they use the verb, "grant," to actually *convey* title. Thus, in that dual-role, Interspousal Transfer Grant Deeds do meet section 852 transmutation requirements, and it was so held in *Kushesh*. Whether the transfer from husband to wife gives rise to a rebuttable presumption of undue influence, whether wife obtained an unfair advantage over husband and, if so, whether she rebutted the presumption under the guidelines of *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, was not decided in the *Kushesh* appeal but, with directions, was part of the remand to the trial court.

If the opening sentences of a work of literature are important, they are equally worthy of note in a judicial opinion. As officers of the Court, we strive to sustain the confidence of our society in the judicial process. In that regard, it is worth noting the opening paragraph of Justice Gilbert's recent opinion, issued October 9, 2018, in *John Doe vs. the Regents of the University of California* (2018) DJDAR 10084, ___ Cal.App.5th ___, as follows:

“Due process - two preeminent words that are the lifeblood of our Constitution. Not a precise term, but most everyone knows when it is present and when it is not. It is often most conspicuous by its absence. Its primary characteristic is fairness. It is self-evident that a trial, and adjudication, or a hearing that may adversely affect a person's life, must be conducted with fairness to all parties.”

We owe ourselves, and our clients, continuing adherence to this standard in every case we handle, and every time we step into a courtroom.

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